No. 85-5189

In the Supreme Court of the United States

OCTOBER TERM, 1985

LAMONT JULIUS MCLAUGHLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an unloaded handgun is a dangerous weapon or device within the meaning of 18 U.S.C. 2113(d), which provides for an enhanced penalty for the use of a dangerous weapon or device during a bank robbery.

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OPINION BELOW

The opinion of the court of appeals (J.A. 16-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1985. The petition for a writ of certiorari was filed on August 5, 1985, and was granted on November 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The federal bank robbery statute, 18 U.S.C. 2113, provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association * * * [s]hall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; * * *
>
> * * * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

STATEMENT

It is uncontested that on July 26, 1984, petitioner and Ronald Tyrone Hall entered the Equitable Bank in Baltimore, Maryland, wearing stocking masks and gloves. Petitioner displayed a handgun and ordered everyone in the bank to put their hands up and not to move. He pointed the handgun at the tellers and at

the bank customers while Hall vaulted the counter, directed the tellers to open their money drawers, and removed money from the drawers. As the two men fled the bank, they were apprehended by a police officer, who recovered from them a brown paper bag containing $3,400 in currency, the handgun displayed by petitioner during the robbery, and other items used in the robbery. The handgun was subsequently determined not to have been loaded. J.A. 8-9, 12.

Petitioner was indicted on one count of bank robbery in violation of 18 U.S.C. 2113(a), one count of bank larceny in violation of 18 U.S.C. 2113(b), and one count of bank robbery by use of a dangerous weapon or device in violation of 18 U.S.C. 2113(d). J.A. 4-5.[1] He pleaded guilty to the bank robbery and bank larcency charges. Petitioner contended that he had not violated Section 2113(d), however, because the gun he displayed during the robbery was not loaded. After a bench trial on stipulated facts in the United States District Court for the District of Maryland, he was convicted of using a dangerous weapon or device during the commission of a bank robbery in violation of Section 2113(d). He received concurrent sentences of 20 years for bank robbery, eight years for bank larceny, and 25 years for bank robbery by use of a dangerous weapon or device. J.A. 14-15.

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[1] The bank robbery count alleged that petitioner "did by intimidation, take from the presence of [three tellers], money in the amount of $3,400.00, more or less, belonging to and being in the care, custody, control, management, and possession of" a bank (J.A. 4). The bank larceny count alleged that petitioner "did take and carry away, with intent to steal" the $3,400 (J.A. 5). The aggravated bank robbery count alleged that petitioner "did assault [three tellers] by pointing a firearm at them and in their direction" (*ibid.*).

Because the Fourth Circuit had held in *United States* v. *Bennett*, 675 F.2d 596, 599, cert. denied, 456 U.S. 1011 (1982), that a gun "openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded, and such exhibition violates section 2113(d)," petitioner suggested that the initial hearing on appeal be conducted en banc (Pet. Br. 3-4). The Fourth Circuit declined, and summarily affirmed petitioner's conviction (J.A. 16-17).

SUMMARY OF ARGUMENT

The issue presented in this case is whether petitioner used a dangerous weapon or device by pointing an unloaded gun at the tellers in the bank he robbed. Petitioner argues that an unloaded gun is not a dangerous weapon or device because it lacks the objective capability of inflicting harm, and a device that does not have the objective capability of inflicting harm is not dangerous. As an initial matter, petitioner is wrong because an unloaded gun—like, for example, a blackjack—is objectively capable of inflicting harm even though incapable of firing bullets; it may be used by a robber to strike bank employees or customers, as courts have long recognized. An unloaded gun is a "dangerous weapon or device" for that reason alone.

In addition, displaying a gun is dangerous because it may provoke a violent response. Therefore, a gun is a dangerous weapon even if it is unloaded because its apparent capability of inflicting harm creates danger. The language and legislative history of Section 2113(d) indicate that Congress specifically intended that section to cover the display of weapons that have

the apparent ability to inflict harm. Especially telling is the debate preceding addition of the words "or device" to Section 2113(d), which shows that this was done to make clear that the section covered weapons such as fake bombs and imitation guns.

Nearly all the state courts that have considered the question have held that state robbery statutes providing enhanced punishment for the use of a dangerous weapon during a robbery cover unloaded guns. Thus, eight states have held that an unloaded gun is a dangerous weapon when used in a robbery; only Wisconsin's courts have held to the contrary, and the Wisconsin legislature subsequently amended the State's robbery statute to provide enhanced punishment for brandishing an unloaded gun during commission of the offense. This supports our conclusion that an unloaded gun is naturally and properly considered to be a dangerous weapon or device.

Contrary to petitioner's claim, our construction of Section 2113(d) does not make Section 2113(a) mere surplusage, any more than state aggravated robbery statutes rendered their "straight" robbery statutes superfluous. A person may rob a bank without using any weapon or device at all, in which case only Section 2113(a) would be violated. Moreover, it appears that merely carrying a gun, without displaying it, is not an assault using a dangerous weapon or device, so that even some armed robberies may not be proscribed by Section 2113(d). Finally, there is no merit whatever to petitioner's assertion that the court of appeals' construction of the statute impermissibly establishes an irrebuttable presumption or otherwise interferes with the right to a fair trial.

ARGUMENT

AN UNLOADED GUN IS A "DANGEROUS WEAPON OR DEVICE" WITHIN THE MEANING OF 18 U.S.C. 2113(d)

The federal bank robbery statute, 18 U.S.C. 2113, was enacted in 1934.[2] Section 2113(a) proscribes bank robbery "by force and violence, or by intimidation," and authorizes imprisonment of violators for up to 20 years. Section 2113(d) provides that anyone who, while robbing a bank, "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device" may be imprisoned for up to 25 years.[3] This Court has stated that the phrase "by use of a dangerous weapon or device" must be read, " 'regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision.' " *Simpson* v. *United States*, 435 U.S. 6, 12 n.6 (1978), quoting *United States* v. *Beasley*, 438 F.2d 1279, 1284 (6th Cir.) (McCree, J., concurring in part and dissenting in part), cert. denied, 404 U.S. 866 (1971). Thus, Section 2113(d) effectively contains two separate clauses, one proscribing assault by use of a dangerous weapon or device and another proscribing putting life in jeopardy by the use of a dangerous weapon or device. As the indictment shows (J.A. 5), petitioner was charged and convicted under the clause proscribing assault with a dangerous weapon or device.

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[2] The statute was originally codified at 12 U.S.C. (1946 ed.) 588b. It was modified without material alteration and recodified at 18 U.S.C. 2113 in 1948. *Prince* v. *United States*, 352 U.S. 322, 326 n.5 (1957).

[3] Sentences ordered under Subsections (a), (b), and (d) of Section 2113 may not be consecutive, so that the maximum sentence that may be served for a single robbery that violates all three subsections is 25 years. *Prince*, 352 U.S. at 329 & n.11.

The two courts of appeals that have squarely addressed the question whether an unloaded gun is a dangerous weapon or device within the meaning of Section 2113(d) have agreed that it is. *United States* v. *Bennett*, 675 F.2d 596, 599 (4th Cir.), cert. denied, 456 U.S. 1011 (1982); *United States* v. *Crouthers*, 669 F.2d 635, 639 (10th Cir. 1982). One district court has held to the contrary. *United States* v. *Potts*, 548 F. Supp. 1239 (N.D. Cal. 1982).[4] Petitioner argues (Br. 16-17), relying on *Potts*, that in order to establish a violation of Section 2113(d) the government must show " 'a threat or attempt to inflict bodily harm, coupled with the present ability to commit violent injury upon the person of another.' " 548 F. Supp. at 1241, quoting *United States* v. *Coulter*, 474 F.2d 1004, 1005 (9th Cir.), cert. denied, 414 U.S.

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[4] A number of courts of appeals have addressed claims that the government failed to establish that a dangerous weapon or device was used in a bank robbery because the government failed to prove that the gun the robber brandished was loaded. As petitioner states (Br. 10), those courts have unanimously agreed that the government need not prove directly that the gun was loaded. Petitioner does not disagree with such holdings, stating (Br. 15) that "[a]bsent evidence to the contrary, a jury would be correct in inferring (or presuming) that the weapons used during a bank robbery were dangerous from the mere fact that weapons were exhibited." A number of those courts, by stating that juries may infer that a gun was loaded from the fact that a robber displayed it, arguably implied that a jury must find that a gun is loaded in order to conclude that a dangerous weapon or device was used in the robbery. See, *e.g.*, *United States* v. *Wardy*, 777 F.2d 101, 105-106 (2d Cir. 1985); *United States* v. *Terry*, 760 F.2d 939, 942 (9th Cir. 1985). However, none of those courts has held directly that an unloaded gun is not a dangerous weapon or device, nor did they need to resolve that issue in light of the fact that the cases before them involved supportable jury findings that the guns were in fact loaded.

833 (1973). In petitioner's view, an unloaded gun is not capable of inflicting harm, but is only apparently capable of doing so, and accordingly he did not violate Section 2113(d). Petitioner's argument fails because an unloaded gun is capable of inflicting harm and because Congress intended Section 2113(d) to proscribe the use of weapons on the basis of their apparent ability to inflict harm.

A. An Unloaded Gun Is Objectively Dangerous Both Because It May Be Used As A Bludgeon And Because Its Display During A Robbery Creates A Materially Greater Risk Of A Violent Response By Others

1. Although a gun is normally thought of as a dangerous weapon because it may be fired, it has long been recognized that a gun is also dangerous because it may be used as a bludgeon. More than half a century ago, a California court held that an unloaded gun was a "dangerous or deadly weapon" under an aggravated robbery statute because "[i]t is a matter of common knowledge that in committing robbery pistols are frequently used as bludgeons rather than as firearms." *People* v. *Egan*, 77 Cal. App. 279, 284, 246 P. 337, 339 (1926). As recently as last December, a court of appeals' opinion reported, in a case brought under Section 2113(d), that a bank robber used his gun to strike a security guard. *United States* v. *Wardy*, 777 F.2d 101, 103 (2d Cir. 1985).[5] Thus

[5] The court stated that "[a]s the guard started to open the outer door leading from the vestibule to the street, one of the robbers struck him on the head with a gun, spun the guard around, struck him again with the gun, and then ordered him to get behind the door" (777 F.2d at 103). The court affirmed the conviction under Section 2113(d) "[w]ithout resolving whether the use of a gun as a bludgeon—absent other circumstances present here—constitutes the use of a dangerous weapon within the scope of section 2113(d)" (777 F.2d at 105).

"[t]he flourishing or pointing of a pistol, whether loaded or not, by any able-bodied person constitutes a threat to inflict bodily injury coupled with a present ability to commit violent injury upon the person of another. Pistol whipping, at a minimum, is being threatened." *United States* v. *Brannon*, 616 F.2d 413, 419-420 (9th Cir.) (Sneed, J., concurring), cert. denied, 447 U.S. 908 (1980). See also *Bennett*, 675 F.2d at 599 ("[a] robber might well strike a recalcitrant teller with an unloaded rifle"). State courts agree that it is not necessary to show that a robber actually threatened to use an unloaded gun as a bludgeon in order to conclude that its display establishes its capability of being used in that manner. See, *e.g.*, *People* v. *Hill*, 47 Ill. App. 3d 976, 977-978, 362 N.E.2d 470, 471 (1977); *State* v. *Levi*, 250 So. 2d 751, 754 (La. 1971); *People* v. *Aranda*, 63 Cal. 2d 518, 532, 407 P.2d 265, 274, 47 Cal. Rptr. 353, 362 (1965). In short, an unloaded gun *is* capable of directly inflicting harm and it is a dangerous weapon or device for that reason.

2. Brandishing an unloaded gun during a bank robbery is also objectively dangerous because it greatly increases the risk of provoking a violent response. As the court in *Bennett* stated: "Brandishing weapons during a robbery threatens victims and bystanders alike. The same danger, apprehension, and tension are created whether the gun is loaded or unloaded. * * * [A] guard or a passing policeman, seeing a rifle displayed, might well reflexively fire his weapon, endangering robbers and bystanders alike; a threatening weapon might well trigger precipitous action on the part of frightened or nervous bank employees or by-

standers." 675 F.2d at 599.[6] Therefore, an unloaded gun is a dangerous weapon because its display may provoke violence. It is sensible to punish a robber who displays a weapon more severely than a robber who does not because a robber who brandishes a weapon creates a greater risk that injury will result, even if the weapon he displays is unloaded.[7]

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[6] See also *Baker* v. *United States*, 412 F.2d 1069, 1072 (5th Cir. 1969), cert. denied, 396 U.S. 1018 (1970) ("[t]he primary capacity of a gun to harm—by the discharge of a bullet from the muzzle—plus its apparent capacity to carry out that harm, combined with a highly charged atmosphere and the possibility of action by employees or others to prevent the robbery, is a complex of circumstances in which the person on the scene is in jeopardy of harm which may occur in any one of various ways"); *United States* v. *Beasley*, 438 F.2d 1279, 1283 (6th Cir.), cert. denied, 404 U.S. 866 (1971) ("even though inert, this device [a fake bomb] put life in danger as surely as a live weapon could. * * * The threat to use any apparently deadly device is far more likely to lead to retaliation by deadly force, either by the victim, by rescuers, by the police, and, in return, by the robber, than assaultive language."); *State* v. *Levi*, 250 So. 2d at 753 ("[t]he highly charged atmosphere at the scene of a pistol-robbery is conducive to violence, whether the pistol is loaded or unloaded").

[7] It has been said that a criminal who is knowledgeable about the law might be encouraged to use a loaded gun rather than an unloaded gun when robbing a bank since the maximum penalty would be the same if courts hold that an unloaded gun is a dangerous weapon or device within the meaning of Section 2113(d). Ponsoldt, *A Due Process Analysis of Judicially-Authorized Presumptions in Federal Aggravated Bank Robbery Cases*, 74 J. Crim. L. & Criminology 363, 389 (1983). Equally true, however, is that the rule we propose encourages knowledgeable criminals not to display any weapon at all during a bank robbery. As we will show (pages 11-13, *infra*), that is the choice Congress made.

B. The Legislative History Shows The Intent Of Congress To Include Unloaded Firearms Within The Phrase "Dangerous Weapon Or Device"

It is clear that Congress intended Section 2113(d) to punish bank robbers who inspire fear through the use of dangerous weapons or devices, whether or not those weapons or devices are objectively capable of the use to which they are normally put. Indeed, the statute's legislative history, though generally "meager" (*Prince* v. *United States*, 352 U.S. 322, 328 (1957)), is particularly enlightening on this point. An addition to the bill that became Section 2113(d) and the accompanying exchange between Congressmen make absolutely clear that Congress intended the display of a weapon or device with the apparent ability to inflict harm to be sufficient to constitute a violation of Section 2113(d). Representative Blanton was concerned that courts would not construe "dangerous weapon" broadly. He gave three examples of the sorts of instrumentalities that he thought ought to be covered but might not be covered: "a bottle of nitroglycerin," "a bottle of water asserted to be nitroglycerin," and "one of these new kind of Indiana six shooters carved out of a piece of wood with a pocket knife." 78 Cong. Rec. 8132 (1934). He noted, in the case of the bottle of water, that it "would have the same effect psychologically on the minds of the people in the bank" as an actual bottle of nitroglycerin (*ibid.*), indicating that he was of the view that the apparent ability to inflict harm was sufficient to constitute robbery by use of a dangerous weapon. The bill's manager, Congressman Sumners, agreed, suggesting that it was the perspective of the person "behind the counter" that mattered (*ibid.*). Representative Blanton proposed that the words "or device"

be added to the statute to ensure that it would be construed to cover the sorts of instrumentalities he had mentioned. Congressman Sumners, agreed, although he thought the statute already "cover[ed] the matter" (*ibid.*), and the bill was amended to proscribe robbery "by the use of a dangerous weapon or device." [8]

Thus it is clear that Congress intended Section 2113(d) to proscribe the use of weapons or devices that have the apparent capability of inflicting harm.[9] Therefore an unloaded gun is a dangerous weapon or device. Indeed, Representative Blanton gave as an example of the sort of instrumentality that he thought would be covered by the term "device" an "Indiana six shooter," which he described as a wooden gun. If a wooden gun is a dangerous weapon or device, then

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[8] Congressman Dockweiler proposed spelling out Congress's concern even more clearly, suggesting that the phrase "instrumentality intended to instill fear" be added to the part of the bill that is now Section 2113(d). Representative Blanton stated that such an addition was unnecessary, if the bill were amended as he proposed, since the addition of "'[d]evice' would cover the situation." 78 Cong. Rec. 8132 (1934).

[9] Three courts of appeals have held that fake bombs, like unloaded guns, are dangerous weapons or devices within the meaning of Section 2113(d). *United States* v. *Marx*, 485 F.2d 1179, 1185 (10th Cir. 1973); *United States* v. *Cooper*, 462 F.2d 1343, 1344-1345 (5th Cir.), cert. denied, 409 U.S. 1009 (1972); *United States* v. *Beasley*, 438 F.2d at 1282-1283. One circuit has held that a fake bomb is not a dangerous weapon or device under Section 2113(d). *Bradley* v. *United States*, 447 F.2d 264 (8th Cir. 1971). Thus, most of the courts of appeals to consider the matter have concluded that the apparent ability to cause harm is enough to satisfy the requirements of Section 2113(d), even though none of those courts of appeals indicated awareness of the significance of the addition of the words "or device" to Section 2113(d) and the exchange accompanying it.

a real gun is a dangerous weapon or device whether or not it is loaded.

C. The State Courts Agree That An Unloaded Gun Used In A Robbery Is A Dangerous Weapon

Courts in eight of the nine states to consider the question have held that an unloaded gun is a dangerous weapon under statutes authorizing additional punishment for persons who use a dangerous weapon to commit a robbery. *State* v. *Parker*, 139 Vt. 179, 183, 423 A.2d 851, 853 (1980); *State* v. *Prince*, 227 Kan. 137, 141, 605 P.2d 563, 568 (1980); *State* v. *Nichols*, 276 N.W.2d 416, 417 (Iowa 1979); *People* v. *Hill*, 47 Ill. App. 3d 976, 977-978, 362 N.E.2d 470, 471 (1977); *State* v. *Levi*, 250 So. 2d 751, 754 (La. 1971); *People* v. *Aranda*, 63 Cal. 2d 518, 532, 407 P.2d 265, 274, 47 Cal. Rptr. 353, 362 (1965); *State* v. *Montano*, 69 N.M. 332, 334, 367 P.2d 95, 96 (1961); *Hayes* v. *State*, 211 Md. 111, 116, 126 A.2d 576, 578 (1956).[10] Almost all of these courts have

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[10] Other courts have suggested that an unloaded gun is a dangerous weapon when used in a robbery. *State* v. *Herrera*, 63 Hawaii 405, 410, 629 P.2d 626, 630 (1981); *Meredith* v. *United States*, 343 A.2d 317, 320 (D.C. 1975); *State* v. *Taylor*, 408 S.W.2d 8, 10 (Mo. 1966). One state court has suggested that an unloaded gun used in a robbery is not a "deadly weapon or dangerous instrument." *Carter* v. *State*, 420 So. 2d 292, 294 (Ala. 1982). A number of other state courts have held that an unloaded gun used in a robbery is a "deadly" weapon under statutes providing enhanced punishment for the use of a deadly weapon. *State* v. *Bailey*, 273 S.C. 467, 470, 257 S.E.2d 231, 233 (1979), cert. denied, 444 U.S. 1083 (1980); *Kennedy* v. *Commonwealth*, 544 S.W.2d 219, 221 (Ky. 1977); *Campbell* v. *State*, 464 S.W.2d 334, 335 (Tenn. Crim. App. 1971). See generally Annot., 79 A.L.R.2d 1412, 1426-1430 (1971), and later case service, *id.* at 114-116 (1979); *id.* at 59-61 (Supp. 1985).

noted that an unloaded gun may be used as a bludgeon. Some have stressed the highly charged atmosphere at a robbery where the robber brandishes a gun or noted that it is the subjective impression of the victims that matters. *Prince*, 227 Kan. at 141-142, 605 P.2d at 568; *Levi*, 250 So. 2d at 753; *Hayes*, 211 Md. at 114, 126 A.2d at 578.

Wisconsin is the only state we know whose courts have held that an unloaded gun is not a dangerous weapon when used in a robbery.[11] *Lipscomb* v. *State*, 130 Wis. 238, 242, 109 N.W. 986, 988 (1906).[12] The

[11] The states are divided on the issue of whether an unloaded gun is a dangerous weapon under assault statutes providing for additional punishment for the use of a dangerous weapon in an assault, even though robbery has long been defined as combining the elements of assault and larceny. See Annot., 79 A.L.R.2d at 1415-1426. The apparent reason for this is that, although robbery "involves within it the idea of an assault, either actual or constructive," the assault involved in a robbery "is often merely constructive." *Chapman* v. *State*, 78 Ala. 463, 464 (1885) (holding that there was no assault but noting that its conclusion might have been different "if the indictment had been for robbery"). See also *Hayes* v. *State*, 211 Md. at 114-115, 126 A.2d at 578 (noting the "distinction between assault with a dangerous weapon and robbery or attempted robbery with a dangerous weapon" and stating that, in robbery cases, "it is held to be immaterial whether the pistol used to effect the taking or attempted taking is loaded or unloaded"). Thus, cases holding that an assault with an unloaded gun is not punishable as an assault with a dangerous weapon, such as *Price* v. *United States*, 156 F. 950 (9th Cir. 1907), are not on point.

[12] The court in *Lipscomb* noted that one state robbery statute prohibited robbery while "armed with a dangerous weapon, with intent, if resisted to kill or maim," and concluded that the element of intent to kill or maim if resisted was "wholly lacking" in the case of robbery by use of an unloaded gun (130 Wis. at 241, 109 N.W. at 987). The court went on to conclude that an unloaded gun is not a dangerous weapon under a similar statute, proscribing assault with a dangerous weapon with intent to rob, that did not require proof of intent to kill or maim if resisted (130 Wis. at 241, 109 N.W. at 988).

Wisconsin Supreme Court followed *Lipscomb* in *Luitze* v. *State*, 204 Wis. 73, 78-80, 234 N.W. 382, 383 (1931), but the court suggested that it would be advisable to amend the State's statutes to provide that the use of a gun, "whether loaded or unloaded," would constitute robbery by use of a dangerous weapon. The Wisconsin legislature subsequently amended the statute to the end suggested by the court. See *State* v. *Antes*, 74 Wis. 2d 317, 326 n.3, 246 N.W.2d 671, 675 n.3 (1976). The Wisconsin statutes now provide that robbery "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon" is subject to additional punishment. Wis. Stat. Ann. § 943.32 (2) (West 1982). Since a robbery victim would reasonably believe that a gun pointed at him is dangerous, robbery by use of an unloaded gun is now subject to added punishment in Wisconsin as well as elsewhere.[13]

[13] Fifteen other states have statutes that on their face appear to make the use of an unloaded gun during a robbery subject to enhanced punishment to the same extent as the use of a loaded gun. Alaska Stat. § 11.41.500 (1983) (first-degree robbery includes representation "by words or other conduct that person * * * is armed with a dangerous instrument"); Ariz. Rev. Stat. Ann. § 13-1904(A)(2) (Supp. 1985) (armed robbery includes use of "a simulated deadly weapon"); Ark. Stat. Ann. § 41-21-2(1)(a) (1977) (aggravated robbery includes representation "by word or conduct that he is * * * armed"); Del. Code Ann. tit. 11, § 832(a)(2) (1979) (first degree robbery includes displaying "what appears to be a deadly weapon"); Ga. Code Ann. § 16-8-41 (1982) (armed

The fact that the states have nearly unanimously concluded that an unloaded gun used in a robbery is a dangerous weapon supports our contention that that

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robbery includes the use of a "device having the appearance of [an offensive] weapon"); Mich. Comp. Laws Ann. § 750.529 (West 1968) (armed robbery includes the use of "any article used or fashioned in a manner to lead the person so assaulated to reasonably believe it to be a dangerous weapon"); Mo. Ann. Stat. § 569.020.1(4) (Vernon 1979) (first-degree robbery includes cases where robber "[d]isplays or threatens the use of what appears to be a deadly weapon or dangerous instrument"); N.H. Rev. Stat. Ann. § 636:1(III)(b) (1974) (robbery is class A felony if robber "reasonably appeared to the victim to be armed with a deadly weapon"); N.D. Cent. Code § 12.1-22-01.2 (1976) (aggravated robbery if robber "possesses or pretends to possess a firearm"); Okla. Stat. Ann. tit. 21, § 801 (West 1983) (aggravated robbery if robber uses a firearm, "whether the firearm is loaded or not"); 18 Pa. Cons. Stat. Ann. § 3701(a)(1) (Purdon 1983) (first-degree robbery if robber puts victim "in fear of immediate serious bodily injury"); S.D. Codified Laws Ann. § 22-30-6 (1979) (first-degree robbery includes "putting the person robbed in fear of some immediate injury to his person"); Utah Code Ann. § 76-6-302(1)(a) (1978) (aggravated robbery includes use of "a facsimile of a firearm"); Wash. Rev. Code Ann. § 9A.56.200(1)(b) (1977) (first-degree robbery includes displaying "what appears to be a firearm or other deadly weapon"); Wyo. Stat. § 6-2-401(a)(ii) (1983) (aggravated robbery includes use of "a simulated deadly weapon").

Two states have statutes that on their face appear to make robbery by use of an unloaded gun the second of three degrees of robbery. N.Y. Penal Law § 160.10(2)(b) (McKinney 1975) (second-degree robbery if robber displays "what appears to be a pistol"); Or. Rev. Stat. § 164.405 (1985) (second-degree robbery if "armed with what purports to be a dangerous or deadly weapon"; but see *State* v. *Vance*, 591 P.2d 335, 362 (Or. 1979) (concurring opinion) (suggesting that use of an unloaded gun is third-degree robbery)).

Two states have statutes that on their face suggest that robbery by use of an unloaded gun is not an aggravated of-

conclusion is in accordance with the meaning Congress intended for the phrase "dangerous weapon or device." [14]

D. Concluding That An Unloaded Gun Is A Dangerous Weapon Does Not Negate Section 2113(a) Or Create An Unconstitutional Irrebuttable Presumption

Neither petitioner's claim that our interpretation of Section 2113(d) renders Section 2113(a) superfluous nor his argument that the Fourth Circuit has created an unconstitutional irrebuttable presumption has merit.[15]

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fense. Colo. Rev. Stat. § 18-4-302 (1978) (possession of article appearing to be a deadly weapon is "prima facie evidence" that robber was armed); Conn. Gen. Stat. Ann. § 53a-134 (1985) (provides that it is an affirmative defense to first-degree robbery if "firearm was not a weapon from which a shot could be discharged").

[14] Similarly, the fact that so many states have statutes that on their face appear to provide enhanced punishment for the use of an unloaded gun during a robbery (see note 13, *supra*) supports our argument that it is sensible to punish robbery by use of an unloaded gun more severely than robbery where no weapon is displayed.

[15] Petitioner has wisely refrained from arguing that the rule of lenity requires that the phrase "dangerous weapon or device" be construed to exclude an unloaded gun, since invocation of that rule would be inappropriate in this case. This Court has stated that "[a]lthough penal laws are to be construed strictly, they 'ought not to be construed so strictly as to defeat the obvious intention of the legislature.'" *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), quoting *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 367 (1829). As we have shown, Congress clearly intended Section 2113(d) to proscribe the use of weapons that appear dangerous. Furthermore, the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget

1. Contrary to the opinion of the district court in *Potts*, the conclusion that an unloaded gun is a dangerous weapon or device under Section 2113(d) does not "destroy[] any distinction between 2113(a) and 2113(d)" (548 F. Supp. at 1240), any more than the decisions of the many courts that have held that robbery by use of an unloaded gun is first-degree robbery eliminated second-degree robbery. A robber may attempt to rob a bank without using any weapon at all. For example, a robber could grab a bank employee and threaten to beat or strangle him. Robbers frequently pass notes to tellers demanding money and suggesting that they are armed, although they may be unarmed.[16] In such cases, Section 2113(a) clearly applies and Section 2113(d) does not.

Even in the case of a robber who is in fact armed, there are situations where Section 2113(a) applies although Section 2113(d) may not. For example, if a robber approaches a teller and demands money, without displaying a weapon, it appears that the robber would not be subject to punishment under Section 2113(d), even if in fact the robber has a concealed weapon.[17] The reason for that, in the lan-

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one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). That a gun, loaded or unloaded, is a dangerous weapon when used in a robbery is clear, as the near unanimous agreement with that conclusion by the state courts shows.

[16] That was appparently the case in *United States* v. *Brown*, 412 F.2d 381 (8th Cir. 1969). In that case the robber approached a teller and passed her a note stating: "This is a Hode [*sic*] up. If you say a word I will kill you." *Id.* at 382. After the teller demanded to see his gun, and the robber declined to show it, the teller screamed: "Show me your gun, you little snot, or get out of here." *Ibid.* The robber left empty-handed.

[17] See *United States* v. *Wardy*, 777 F.2d 101, 105 (2d Cir. 1985) ("if the police apprehended a bank robber during the

guage of the statute, is that the robber has not "used" the weapon to "assault" anyone, as Section 2113(d) requires.[18] By keeping his weapon concealed, the robber has not created the sort of charged atmosphere likely to provoke violence described by the Fourth Circuit in *Bennett*. A robber who might have a gun in his pocket may inspire some apprehen-

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course of a robbery and subsequently discovered that he had carried a gun concealed in his belt or in a shoulder holster, a conviction under § 2113(d) would probably be unwarranted").

[18] It appears that Congress is of the view that something more than the carrying of a gun is required to establish its use. In response to this Court's decisions *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), Congress amended 18 U.S.C. 924(c) in 1984 to provide an additional penalty of five years' imprisonment for anyone who "uses or carries" a firearm during a crime of violence, including a "crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Thus, the additional penalty of Section 924(c) now applies even though the defendant is convicted under a provision like Section 2113(d) that provides for an enhanced penalty for the use of a dangerous weapon or device. In spelling that out in the legislative history, in fact, Congress used Section 2113(d) as an example, stating that a person convicted under Section 2113(d) would also be subject to five years' imprisonment under Section 924(c) if the dangerous weapon or device was a firearm. S. Rep. 98-225, 98th Cong., 1st Sess. 313-314 (1983). In its example, the Senate report referred to "using a gun * * * by pointing it at a teller or otherwise displaying it." *Id.* at 314. In a footnote, the report noted that "evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm" under Section 924(c). S. Rep. 98-225, *supra*, at 314 n.10. Thus, Congress appeared to understand, as the language of Section 924(c) suggests, that there is a distinction between carrying a gun and using a gun.

sion, but certainly not to the same degree as a robber who has a gun in his hand, especially one who is pointing it at someone. Thus there is much less danger that a guard or a passing policeman will reflexively fire, endangering bank employees and customers. Furthermore, any danger of pistol whipping is at least less imminent when a gun is not on display. In short, the brandishing of a gun creates special dangers, and it is reasonable to construe Section 2113(d) as being addressed to that added danger.[19] So construed, Section 2113(d) is clearly not at all redundant with Section 2113(a).

2. The bulk of petitioner's brief (at 9-18) is devoted to the wholly untenable argument that the Fourth Circuit's decision in *Bennett* established an unconstitutional irrebuttable presumption in violation of the rule that the government must prove each element of the offense charged beyond a reasonable doubt.[20] To

[19] Carrying a firearm also warrants additional punishment, but Section 924(c) is addressed to that problem. See note 18, *supra*.

[20] Petitioner's argument concerning irrebuttable presumptions appears to be based on the discussion of Section 2113(d) in Ponsoldt, *supra*. Professor Ponsoldt in that article repeatedly refers to the aggravated offense punished by Section 2113(d) as "jeopardizing life" (74 J. Crim. L. & Criminology at 385, 386, 388), neglecting the fact that the section contains a clause prohibiting assault using a dangerous weapon or device as well (see page 6, *supra*). Moreover, while acknowledging that Congress could properly determine that the use of an unloaded gun is covered by Section 2113(d) (74 J. Crim. L. & Criminology at 389), Professor Ponsoldt appears to have been unaware of the evidence that Congress intended Section 2113(d) to apply whenever an apparently dangerous weapon is used in a bank robbery and added the words "or device" to the section in order to make that intention clear (see pages 11-13, *supra*).

the extent that petitioner argues in this section that a gun must be capable of firing or it is not a dangerous weapon or device, his argument, while wrong, is at least relevant to the issue of statutory construction before this Court. If, contrary to our argument, this Court determines that an unloaded gun is not a "dangerous weapon or device" within the meaning of Section 2113(d), then petitioner is of course entitled to have his conviction for violating that section vacated. In the future, the government would not be able to argue that brandishing an unloaded gun is the use of a dangerous weapon under Section 2113(d), at least in the absence of different facts such as the actual use of the gun as a bludgeon. But petitioner's repeated claim that the Fourth Circuit has established an irrebuttable presumption (Br. 9, 11 n.7, 12, 13, 18) adds nothing to his argument. If under the correct interpretation of the statute an unloaded gun is a dangerous weapon or device when used in a bank robbery, then the government must establish beyond a reasonable doubt that a bank robber brandished a gun during a bank robbery. But there is no reason why the legal question whether displaying an unloaded gun is the use of a dangerous weapon or device should be left to the jury in each case, as petitioner appears to suggest (Br. 17).[21] In short, petitioner's discussion of presumptions is beside the point.

[21] Moreover, we are puzzled by petitioner's repeated references to jury deliberations. Petitioner waived his right to a jury trial (J.A. 8) and argues (Br. 17) that an unloaded gun is not a dangerous weapon or device as a matter of law. No jury instructions are involved in this case. Accordingly, the question of what issues should be decided by a jury is not presented in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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